

## Case Report

# Alleged rape: An Appeal case

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## Abstract

This paper charts the progress of an alleged rape case from first complaint to its conclusion in the Court of Criminal Appeal in England.

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## 1. Background

At the time of the incident, the complainant was age 23. She began a relationship with the defendant about four years prior to the incident, and the following year had a child.

When the baby was about six months old, the complainant alleged that the defendant became violent towards her, often hitting her for no reason. Seven months before the incident under investigation, the complainant alleged that the defendant beat her quite badly, and for the first time, the complainant reported the matter to the police. He had also threatened her with a Stanley knife. She left him and moved back to her mother, the custody of the child being shared by Court order. Finally she moved into a place of her own. She worked nights during the week and had her child from Friday to Monday, and he had the child during the week. He had never been in her new home.

## 2. The case: Complainant account

One morning during the early hours, in 2001, at about 3.15 a.m., the complainant received a mobile phone call from the defendant, asking about the baby. The defendant became threatening on the phone.

Later, she was awoken by a knock on the door. She opened the door to find the defendant. He barged past her and entered the house uninvited. He was angry and slapped her hard across the face. He grabbed the crotch area of her pants, pulled hard and her pants ripped. He was intimidating. He punched her very hard two or three times in the middle of her face and also in her head. She began to bleed.

He ordered her to make him a cup of coffee. He got the baby, who was screaming. The baby was now age three. He was abusive. He broke an empty milk bottle. She went to the bathroom to clean herself up and changed her ripped pants.

The defendant then asked her repeatedly for sex, and attempted to pull her upstairs. Eventually he pulled her upstairs into the front bedroom, where he pushed her onto her knees so that she was bent over the bed. The child, who was screaming hysterically was put on the bed.

The defendant pulled her pants down and he knelt behind her. He inserted his erect penis into her vagina and started having sex. He then pulled his penis out and got her to lie on the bed. He made her lie on her front and put his erect penis up her back passage. She was screaming in pain and struggling trying to get free. The child was trying to put her arms around her mother and telling her father to get off her mother. The defendant carried on having intercourse with her until he ejaculated.

She got dressed and went to the bathroom to clean herself up. He was abusive to her and would not leave her

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alone. All three walked to a building society where she withdrew some money. He made her give him 10 pounds. She also had to buy him a drink. They went home by taxi. He rifled through her belongings. He said that he was having her DVD player and her DVD collection. He wrote out a receipt for them for her.

The defendant started asking the complainant again for sex. He pulled her clothes down. He forced her onto the floor, on her back. He got on top of her, put his penis into her vagina and eventually ejaculated.

Two taxis arrived. The assailant, the child, the DVD player and the DVDs got into one taxi, and she went to hospital in the other.

As a result of the alleged assault, the complainant alleged that she had a large cut under her nose which was glued, and swelling to her nose area and her top lip. She also complained of swelling and what she thought would be bruising to her left hand, and soreness and swelling to her head. Her bottom was also very sore.

### 3. The defendant's account

The defendant was age 27. He claimed that the acts of intercourse were consensual. He denied robbery, stating that the transfer of the DVD player and the discs was as a result of a proper and amicably agreed arrangement with the complainant.

He acknowledge that he did cause the cut to the complainant's lip below her nose. In anger, he swept her mobile phone off the table and it struck her in the face. He was prepared to accept that his behaviour was reckless with regard to this injury and was prepared to plead guilty on that basis.

When the baby was born, the defendant was out of work. The complainant went back to work, and eventually the defendant discovered that the complainant was having an affair. He said that they argued about financial short-ages, and eventually they parted. He obtained a Court order to regularise his care of the child during the week, the complainant looking after the child at weekends.

The complainant would come to the defendant's address to collect the child, and he stated that she had entered his house. Approximately once a week they had consensual sexual intercourse together at his house.

The defendant became aware that the complainant was prosecuted and convicted for making false statements for benefit purposes, and received a community punishment order.

The defendant agreed that he did telephone the complainant in the early hours of the morning and went to her house later that morning. They went into her front room, eventually fell to arguing, and he caused the injury to her mouth. A milk bottle did smash on the floor but it was not the result of any deliberate action. Because he was sorry for what he had done, he gave her a cuddle, and he sensed that they were both aroused. She led him up the stairs whilst the child stayed downstairs watching

television. In the bedroom, she pulled her nightie up and her pants down, bending over the end of the bed, and they had sexual intercourse with him behind her, which he stated was her favourite position.

The defendant denied having anal sex with the complainant.

Later they went to a building society, and then to a department store. The complainant made the phone calls for the taxis and they went back to the complainant's house. Whilst waiting for the taxis to arrive, the defendant said to the complainant 'Do you fancy a quick one before we have to go'. They lay on the living room floor, he lying behind her in the 'spoon' position.

### 4. Examination and swabs

The complainant was seen at hospital at 11.34 a.m. on the day of the alleged assault. Her presenting complaint noted by the triage nurse was that she had fallen onto a toy and had sustained a laceration and swelling. The hospital doctor saw her at 2.20 p.m., and recorded that the presenting complaint was of a lip laceration, caused by her boyfriend, by a fist to her face at 6.30 a.m. The doctor observed that there was a superficial laceration under her nose, approximately 7 mm (0.3 in.) in length, with no oral injury. The injury was glued. At no time did the complainant allege at hospital that she had been sexually assaulted.

Later the same day, the complainant contact the police and a medical examination was arranged.

The police doctor commenced the examination about 12 h after the defendant had arrived at the complainant's house. She told the doctor that she had been raped on two occasions, being forced to have both anal and vaginal sexual intercourse. Her assailant had also hit her in the face.

The upper lip was bruised and swollen, with the vertical laceration as noted by the hospital doctor. There were also two lacerations on the inside of the upper lip, overlying the upper middle incisor teeth. There were no fresh injuries anywhere else on the body.

There were no vaginal injuries. There was a pool of creamy fluid in the vaginal vault.

There were no injuries to the anus or rectum. There was very liquid faecal stained fluid in the rectum.

Various samples were taken, including a vulval swab, a low vaginal swab, three high internal vaginal swabs, one anal swab and three rectal swabs.

In a later statement, the doctor confirmed the use of both a speculum and a proctoscope during the examination, taking all possible care to avoid contamination. The doctor had not recorded in his notes that there was any difficulty or discomfort when using the instruments, and he concluded that there was not, as he would have recorded a positive finding.

His conclusions (if he had been asked for them initially) would have been that the examination findings were consistent with the complainant having had vaginal and anal sex-

ual intercourse, and with having suffered blunt trauma to her upper lip.

## 5. Forensic examination

The forensic scientist reported that semen was present on the high vaginal swabs, the vulval swabs and the anal swabs. A trace of semen was detected on the rectal swab. DNA profiling showed that the semen came from the defendant, with a high degree of probability.

The forensic scientist stated that it was possible that semen may transfer to the external anal area as a result of vaginal intercourse with subsequent drainage. It was very unlikely that the amount of semen detected on the internal anal swab, together with the trace of semen on the rectal swab, would transfer as a result of drainage following vaginal intercourse.

The forensic scientist concluded that the scientific findings provided strong support for the allegation that the defendant had recent vaginal and anal intercourse with the complainant, rather than vaginal intercourse alone.

## 6. Charges and trial

The defendant was charged with two counts of vaginal rape, one count of anal rape, and one count of assault occasioning actual bodily harm, and was remanded in custody.

Just under six months after the alleged incident, the defendant went on trial. The trial initially proceeded in accordance with the written statements without significant features. The police surgeon confirmed that he took three swabs from the high vaginal area. He took one swab from inside the anal area. The police surgeon confirmed that the complainant had not had any bleeding from her back passage. The police surgeon brought a proctoscope into court to demonstrate it to the jury. He confirmed the presence of fluid in the lower part of the rectum. The complainant made no complaint of discomfort during this part of the examination, there were no signs of injury, and three rectal swabs were taken. Lengthy cross-examination of the police surgeon did not reveal anything new.

The forensic scientist was called the day after the police surgeon. In evidence in chief, the forensic scientist confirmed that she had received five high vaginal swabs, two anal swabs and two rectal swabs. Semen was found on the swabs, including the anal and the rectal swabs, and the DNA profile matched that of the defendant. A trace of semen was found on the rectal swabs, a few spermatozoa. Later the forensic scientist agreed that she had found three sperm heads on the rectal swabs. The amount of semen found on the anal swabs was about the same as the amount found on the vaginal swabs. The scientist told the jury that she considered that the most likely explanation for the semen on the anal swabs was as a result of anal intercourse with ejaculation, because of the amount of semen on the anal swabs.

At the beginning of the cross examination of the forensic scientist, the defence barrister asked to see the scientist's contemporaneous notes. She was then asked if she was sure that there were two swabs from the anus. The scientist said that she was sure that there were two, as there was a photocopy of the packaging, which showed that two swabs were present in one evidence bag.

The scientist agreed that because drainage might result in the presence of a few sperms in the anal canal, the findings had to be interpreted with extreme caution. She agreed that an ejaculate with a low count might contain 20,000,000 sperms in a millilitre. She agreed that there was a risk of contamination of the swabs.

The forensic scientist was recalled after her evidence in chief and the cross-examination. She agreed that she had taken photocopies of the evidence bags in which were the swabs in their tubes, as they had arrived at the laboratory. She agreed that none of the labels on the tubes had been completed, although all the outer aspects of the evidence bags had been completed. She agreed that the photocopies showed that she received five high vaginal swabs, two anal swabs, one vulval swab, one low vaginal swab and two rectal swabs, a total of 11 evidential swabs. The doctor said that he had taken and submitted a control swab; the forensic scientist said that she had not received a control swab.

The forensic scientist said that the standard procedure would be to look at the items in sequential order, and she thought it very unlikely that there would be any mixup. A note had been made that no labelling on the tubes had been present, which she said was unusual but did occur.

The forensic scientist had completed a draft statement. In the draft statement she indicated that she considered that the findings provided very strong support for the proposition of anal intercourse. The case and the paper work were reviewed by a supervising officer, and the scientist's opinion was changed from very strong to strong support. Comments made by the supervising officer on the draft statement suggested that there was a need for the forensic scientist to arrange a talk with the doctor who had taken the swabs, to explore the way in which the swabs had been taken. The forensic scientist did not contact the doctor, stating that from the medical examination forms she received with the case she did not feel it was necessary.

A weekend intervened during the trial, and the doctor was recalled on the Monday morning. The doctor said that if one swab was in an evidence bag, or if there were three swabs in one evidence bag, that would go as one item. He had not made a written note of how many individual swabs were taken in this particular case. However, he remembered the case very well. He described the swabs being put in the evidence bag, and he signed the relevant parts on the evidence bag to say that he had taken the samples and they were passed on bloc to the police officer.

The swabs were taken in the order in which the parts were examined, first the vagina, and then the anus and the rectum. By the time the doctor came to examine the anus and the rectum, the swabs taken from the vagina

Table 1  
Swabs taken by the Forensic Medical Officer and received by the Forensic Scientist

Swabs	Taken by Forensic Medical Officer	Received by Forensic Scientist
Vulval	1	1
Low Vaginal	1	1
High Vaginal	3	5
Anal	1	2
Rectal	3	2
Control	1	0
Total	10	11

and vulva were already in the evidence bags and the bags sealed. The bags were put to one side on his desk until the examination was completed and the samples were taken, at which stage the doctor signed the bags and handed them to the police officer.

Asked for further details, the doctor said he had taken one vulval swab, one low vaginal swab, three high vaginal swabs, one swab from the anal canal and three swabs from the rectum. The doctor also said that he had sent one control swab, a total of ten swabs. He later confirmed that he was sure about the numbers of swabs he had taken because it was his standard practice (see Table 1).

The doctor said that it was not his job to fill in the labels on the outside of the tubes themselves, and to be honest, nine times out of ten they did not get filled in at all because they were placed within the bag and the bag sealed, and the label on the evidence bag itself had the details of the patient.

## 7. Verdict

The defendant was acquitted of the two counts of vaginal rape, but convicted of the one count of anal rape and of the assault occasioning actual bodily harm.

## 8. Appeal case—the first

There was an appeal against the conviction, which was dismissed. The Court of Criminal Appeal concluded that there was uncertainty about the number of swabs that had been taken and where they had been taken from, and that this could not form a basis for a conclusion that there had been anal penetration and ejaculation there, the evidence was not inconsistent with the complainant's account and was not sufficiently unreliable to cause doubt about the conviction.

## 9. Criminal Case Review Communication

The case was then referred to the Criminal Cases Review Commission, the independent body set up to investigate suspected miscarriages of justice in England Wales and Northern Ireland. The Commission assesses whether convictions or sentences should be referred to a court of appeal. Scotland has a separate Review Commission.

In April 2003, a statement was obtained from a senior forensic scientist who had reviewed the case. The senior forensic scientist noted that the doctor had examined the anal area, and had taken one swab from just inside the anal canal. A proctoscope had then been introduced and three swabs were taken from the rectal area. The senior scientist noted that semen had been present on the external vulval area, but there was no information about the concentration of semen on the external anal area or on the perineum. The senior scientist noted that as there had there been a lot of semen present on the external areas, it would mean that contamination when inserting a swab into the anal canal might be more likely. She thought that as the anal canal swab had been taken from just inside the area, it would make contamination with semen from the outside more likely than if it had been taken higher up and through a proctoscope.

The senior scientist finally concluded that the laboratory findings did not help to address the issues of whether or not there had been anal intercourse between the complainant and the defendant.

The senior scientist listed published articles relevant to the case.<sup>1–5</sup>

In October 2003, the original investigating forensic scientist reviewed her opinion. She referred to the use of a proctoscope to take the rectal swabs, but not the anal swabs, and she noted that the numbers of swabs examined by her was different to the numbers the doctor had taken and she noted the absence of individual labelling of the swabs. She concluded that it was not possible to determine with certainty the precise area which had been sampled. It was her overall opinion that it was inappropriate to make an evaluation of the findings to assist in addressing whether or not anal intercourse occurred.

## 10. Appeal case—the second

The case came again before the Court of Criminal Appeal in May 2004, two years and three months after the original trial. The Court concluded that they found it impossible to say with confidence that the conviction would have been recorded by the jury if they had had the benefit of the investigating scientists' further conclusions. The conviction was unsafe and the conviction for rape must be quashed. The sentence for the assault was also quashed. The Court stated that the defendant had served his sentence, and a retrial would have been inappropriate. The defendant was out on licence and attended the hearing of the second appeal to the Court of Criminal Appeal.

## 11. Recommendation

On its website The Association of Forensic Physicians<sup>6</sup> has made recommendations regarding the taking of samples from the perianal area, the anal canal, and the rectum of complainant's of sexual assault:

- A. Two swabs should be used consecutively to sample the perianal skin in an area of 3 cm radius from the anus. The first swab should be moistened with sterile water, the second swab should be dry.
- B. Two swabs should be used sequentially to sample the anal canal. The first swab should be moistened with sterile water before being inserted 2–3 cm through the anal orifice and gently rotated. The process is then repeated with a second dry swab.
- C. A proctoscope should be lubricated with a single use sachet of KY jelly. As KY jelly and other lubricants may affect the forensic interpretation of swab results, the doctor must note their use on the forms returned to the forensic scientist.
- D. The proctoscope should be passed at least 3–4 cm into the anus, the obturator removed, and the lower rectum sampled using two dry swabs. The average adult anal canal is about 3 cm long (range 1.4–3.8 cm in males and 1.0–3.2 cm in females). The mucosa of the upper anal canal is a deep purple colour, which readily distinguishes it from the red/pink mucosa of the lower rectum.
- E. The proctoscope should be retained and placed in a tamper evident bag.
- F. If it is not possible to pass a proctoscope, for example because of perianal injury or because of the age of the examinee, an attempt should be made to pass two dry swabs sequentially into the anus to sample the lower rectum and anal canal simultaneously (the swabs being labelled ‘rectum/anal canal’).

- G. All swabs should be placed in sheaths with no transport medium.
- H. All swabs from the same site should be placed in the same tamper evident bag.

The examining doctor is responsible for ensuring that all swabs and other specimens taken during medical examinations are correctly labelled, placed in the appropriate bags, which in turn must be correctly labelled with the donor’s name and the nature of the sample.

Reliance on memory in Court for details of a medical examination conducted months earlier is, sooner or later, bound to lead to errors in evidence and the risk of miscarriages of justice. Good, contemporaneous, comprehensive and legible notes are as vital now as at any time in one’s forensic career. Consulting other experts where there is an overlap of obligations is good forensic practice.

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